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In the Supreme Court of the United States

OCTOBER TERM, 1959

UNITED STATES OF AMERICA, PETITIONER

v.

HONORABLE PEIRSON M. HALL, CHIEF JUDGE, UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The Solicitor General, on behalf of the United States of America, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on January 9, 1960.

OPINIONS BELOW

The opinion of the court of appeals (Appendix, *infra*, pp. 25–29) is not yet reported.

JURISDICTION

The judgment of the court of appeals is included in its opinion filed on January 9, 1960 (Appendix, *infra*, p. 29). The time for filing a petition for a writ of certiorari was extended by Mr. Justice Douglas on April 6, 1960, to and including April 11, 1960.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Rule 71A(h) of the Federal Rules of Civil Procedure provides that any party to a federal condemnation proceeding may, upon demand, have a jury trial of the issue of just compensation. It further provides that the court, "because of the character, location, or quantity of the property to be condemned, or for other reasons in the interest of justice," may order that the issue of just compensation be determined by a commission of three persons appointed by it. The following questions are presented:

1. Whether a federal district judge abused his discretion by denying the demands of the government and many landowners for jury trial and, *sua sponte*, referring to commissioners, substantially simultaneously and on the basis of virtually the same findings, 21 separate condemnation cases involving 300 parcels of land for four different and widely separated federal projects, which cases constituted almost all of the pending condemnation proceedings assigned to him.

2. Whether Rule 71A(h) empowers a court to refer to commissioners issues other than the amount of just compensation payable by the United States.

RULE INVOLVED

Rule 71A(h), Federal Rules of Civil Procedure, provides in pertinent part:

> *Trial.* If the action involves the exercise of the power of eminent domain under the law of the United States, any tribunal specially con-

stituted by an Act of Congress governing the case for the trial of the issue of just compensation shall be the tribunal for the determination of that issue; but if there is no such specially constituted tribunal any party may have a trial by jury of the issue of just compensation by filing a demand therefor within the time allowed for answer or within such further time as the court may fix, unless the court in its discretion orders that, because of the character, location, or quantity of the property to be condemned, or for other reasons in the interest of justice, the issue of compensation shall be determined by a commission of three persons appointed by it. * * * Trial of all issues shall otherwise be by the court.

STATEMENT

This petition seeks review of a judgment of the court of appeals denying a writ of mandamus by which the United States sought to require respondent, the Chief Judge of the United States District Court for the Southern District of California, to vacate a number of orders by which he referred pending federal condemnation cases to commissioners.

The orders, entered by respondent *sua sponte*, denied requests by the government and by a number of the landowners for jury trials, and referred to commissioners, appointed under Rule 71A(h), 21 separate pending condemnation cases involving 300 parcels of land for four different and widely separated federal projects in the Southern District of

California.[1] The cases referred constituted substantially all of the pending condemnation proceedings assigned to respondent.

The first order (filed May 7, 1959), involving three cases in the Lemoore Naval Air Station project (P. 1–6),[2] is typical. After briefly describing the three cases, it states (P. 1–2):

> The property involved in all said cases is being condemned for a Naval Air Base. It is in the vicinity of Lemoore, California. The total acreage involved in the three cases is 30,400.032 acres of land, more or less. It is in an area largely devoted to agricultural uses and purposes and related activities, and land devoted to similar uses is generally similar in character in that area. The kind or type of property rights in such land, claiming just compensation, are or may be of varied nature and the issues will be complicated. While many of the parcels in case No. 1836–ND have been disposed of by stipulated judgments for just compensation, there remain open and unadjudicated at least 138 parcels in that case, many of which have been sub-divided into subparcels according to the holders of the various kinds of rights claimed, or which may be claimed, to be outstanding against the interest

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[1] The cases were filed between August 1, 1956 and August 3, 1959. The orders were entered between May and August, 1959.

[2] "P." refers to the appendices to the government's "Petition for Writ of Mandamus or Other Extraordinary Relief" in the court of appeals. Respondent filed no response thereto (but see fn. 4, *infra*). Certain of the condemnees participated in the court of appeals proceedings in support of respondent's reference orders.

> of the fee owners on the date of taking. One parcel is open in case No. 1902–ND and 17 are open in case No. 1904–ND.
>
> It is impractical, if not impossible, to try all of the remaining parcels in said cases and various interests and estates taken, before one jury, thus necessitating different trials before different juries, either for different parcels, or for like parcels if consolidated, if trial of each parcel is had by jury.

The order then discusses the number of pending condemnation cases in the District and the length of past jury trials in such cases (P. 2–3). It concludes (P. 3):

> It is impossible to estimate either the number of separate trials or the number of days which would be required in jury trials if all the separate parcels in these cases were tried before a jury, or the time when such trials could be had, because of the very heavy docket, not only in condemnation but in all the other civil and criminal cases pending in the Southern District of California, and the number being filed from day to day. It would be a denial of justice to compel those whose properties are taken in the within condemnation proceedings to await trial by jury of each tract or parcel involved in these cases.
>
> The appointment of commissioners in these condemnation cases would result in more uniformity of awards for like property, estates and interests than could be expected if each parcel were tried by jury.

"[B]ecause of the foregoing facts," "and to prevent a denial of justice resulting from delays," it

"appear[ed] to the Court" that "it would be in the interests of justice" that the "issue of just compensation" should be determined by three commissioners, whom it designated (P. 3–5). The order directs the commission (P. 4) to

> * * * file a report or reports, setting forth their conclusions as to the just compensation of the property condemned, making a separate award of just compensation and valuation in the premises with respect to each separate parcel involved, and the person or persons or entity entitled to receive such award or such portions thereof as each may be entitled to receive. If several parcels are in one ownership, and there is no objection by the parties, a single award may be made for such several parcels, without designating the value attributed to each parcel.

Compensation of the commission was fixed at $85.00 a day for the chairman and $75.00 for each of the other two members, and the court reserved the right to make "other and additional allowances for compensation, upon proper showing and notice" (P. 5). Attached to the order were instructions "to guide the Commission in the determination of just compensation," and the commissioners were informed that they "may from time to time request instructions of the Court" (*ibid.*).

On May 12, 1959, the court entered two orders which, respectively, referred to commissioners one case in the Success Dam and Reservoir Project (P. 8–12) and four cases in the Terminus Dam and Reservoir Project (P. 16–21). On May 20, 1959, it

entered an order referring nine cases in the fourth project, the Casitas Dam and Reservoir (P. 23–31). Each of these three orders made the same findings as in the *Lemoore* order, *supra*, as the basis for the references.

On June 1, 1959, the court referred to commissioners another case, filed on May 1, 1959, (P. 12–14), and on August 3 it entered three orders referring three additional cases filed in July (P. 6–8, 14–16, 21–23). Each of these four additional orders incorporated by reference "all of the facts and things" set forth in the May orders, and stated that "For the foregoing reasons, and good cause appearing therefor," the demand for jury trial was denied and the case was referred to commissioners, who by reference were given the same powers as previously conferred by the May orders (P. 7, 13–14, 15–16, 22–23).

On August 25, 1959, the United States filed a motion to vacate the orders of reference (P. 31–33). Attached thereto were four lengthy affidavits (P. 33–78) which set forth the facts with respect to each of the 21 cases that had been referred (P. 39–78), and presented statistics about the number of pending condemnation cases in the District and the estimated time that would be required if the referred cases were tried by jury (P. 33–39). Two of the landowners joined in the government's motion (P. 78–81), but 19 landowners (including some who had previously demanded jury trials) opposed it, and filed counter-affidavits (P. 81–139).

The government's affidavits stated that the parcels acquired for all four projects are, for the most part,

similar in size, adaptability, character and location to other property in the vicinity of the projects; that in the area of each of the projects there are many comparable sales for appraisal purposes; and that the projects are unrelated except that they all involved condemnation proceedings pending before respondent at the time of the orders of reference (P. 39, 45, 47–48, 59, 70). The affidavits also set forth the following facts with respect to the projects:

1. The Lemoore cases involve land in the San Joaquin or Central Valley approximately 40 miles, or one hour's drive, from Fresno, where the district court sits. The area is characterized by relatively large agricultural holdings devoted exclusively to the farming of irrigated crops. Many of the parcels, except for irrigation facilities, are unimproved or carry improvements which do not appreciably enhance their value (P. 39–46).

2. The Success Dam lies across the Tule River, about 72 miles, or a one hour and 45 minutes' drive, from Fresno. The area is a farming community and the lands involved in the project are devoted to cattle raising, citrus groves and other farming operations (P. 46–57).

3. The Terminus Dam and Reservoir Project is in Tulare County in the eastern portion of the central San Joaquin Valley, approximately five miles downstream from the town of Three Rivers and 62 miles southeast of Fresno. The driving time to Fresno is approximately one hour and 15 minutes. The general area has a rural agricultural economy including beef

cattle, citrus orchards and other irrigated crops (P. 57–68).

4. The Casitas Dam and Reservoir cases involve land along the Santa Ana Creek, a tributary of the Ventura River (except for one parcel on the Ventura River itself). The project is approximately 10 miles inland and northwesterly of the City of Ventura. As in the other cases, the area of the Santa Ana Valley is for the most part devoted to cattle ranches and varied agricultural uses, such as feed crops and citrus fruits, although there are a number of modest homesites and small community developments in the area. The site is approximately 65 miles, or a one hour and 15 minutes' drive, from Los Angeles, where the district court sits (P. 68–78).

On October 1, 1959, the district court denied the government's motion, but amended the paragraph in its prior orders setting forth the duties of the commissioners (*supra*, p. 6) to provide that they should make a

> separate award of just compensation and valuation in the premises with respect to each separate parcel, interest, ownership, or claim involved, and the person, or persons, or entity claiming to be entitled to receive such award or such portions thereof as each may claim to be entitled to receive. * * * [P. 140].[3]

[3] The court also denied the government's request (see P. 33) for a stay of the proceedings before the commissions, pending appellate review (P. 141).

We are advised that only one report covering a contested tract has been filed by the commissions.

The United States filed its motion in the court of appeals for leave to file the petition for mandamus on December 11, 1959, leave was granted on December 14, 1959, and the matter was argued before the court of appeals on January 5, 1960 (R. 146–150). Respondent filed no response to the petition.[4] Four days later the court filed a *per curiam* opinion denying the writ. The court recognized that if respondent's orders of reference "wrongfully" deprived the United States "of jury trials upon the issue of just compensation," the writ should issue (App., *infra*, p. 27), and it further held (*ibid.*) that a "condition of calendar congestion standing alone is not justification for a reference to commissioners under the Rule." The court stated (*id.*, pp. 27–29), however, that in seeking an extraordinary writ the United States had a "heavy" burden of showing "clear abuse of discretion"; that the orders of reference "clearly demonstrate" that respondent had other considerations than court congestion "in mind"; that these were valid bases for a reference; and that the United States had "failed to meet" its burden "to make a clear showing" that the various factors relied upon by respondent in making the references "were not involved in these cases."

[4] At the argument, counsel for one of the landowners exhibited to the court what he described as a copy of a letter written by respondent to the court. This letter was not filed in the case, and was not served upon the United States. An Assistant United States Attorney advises that he hastily leafed through the pages of what apparently was a copy of the same letter that was shown to him by one of the commissioners appointed by respondent. He did not recollect the contents of the letter except that it dealt with these proceedings.

REASONS FOR GRANTING THE WRIT

1. This case—and the related case of *United States* v. *Cunningham*, from the Fourth Circuit, in which a petition for a writ of certiorari is being filed simultaneously—present important issues of judicial administration relating to the use of commissioners for determining just compensation in federal condemnation proceedings. In the instant case respondent, the Chief Judge of the District, referred to commissioners substantially his entire docket of pending condemnation cases—21 separate cases involving 300 parcels of land in four separate federal projects. The orders of reference all make the same findings and, as we show *infra* (pp. 17–19), similar findings could be made in most federal eminent domain cases involving the condemnation of substantial tracts of improved land in non-urban areas. As we show (*infra*, pp. 13–16), the intent of Rule 71A(h) is that, when jury trial is demanded in federal condemnation cases, it is ordinarily to be granted; and that a reference to commissioners is to be made only in unusual and extraordinary circumstances relating to the particular land involved. If, however, blanket references may validly be made upon the basis of the factors here invoked, we submit that in many districts trial by commission will become the rule, and trial by jury the exception—a result contrary to that intended by the Rule.[5]

[5] In two recent cases in which courts of appeals upheld orders of reference, the dissenting judges warned against this very danger. In *United States* v. *Wallace*, 201 F. 2d 65 (C.A. 10), Judge Pickett pointed out (p. 68) that "we are laying the

Indeed, such an alarming trend is already discernible. As of December 31, 1959, there were five districts in which *all* pending federal condemnation cases, totalling 1782 tracts, had been referred to commissions. These districts, and the number of tracts referred, are as follows:[6]

W.D. Pa.	299
E.D. S. Carolina	63
E.D. Texas	823
W.D. Texas	554
W.D. Va.	43

In addition, as of that date there had been referred to commissioners (the percentages that follow being approximate) 95% of the 255 pending tracts in the Western District of South Carolina, 90% of the 1108 tracts pending in the District of Kansas, 90% of the 750 tracts pending in the Eastern and Western Districts of Louisiana, 80% of the 659 tracts pending in the District of South Dakota, and 75% of the tracts pending in each of 11 other districts (M.D. Ga.; N.D. and S.D., Iowa; D. Neb.; N.D., E.D., S.D. and W.D., N.Y.; E.D. and W.D., N.C.; and E.D. Va.)—the references in the latter districts constituting approximately 1525 tracts of the 2634 tracts there pending.

Such an extensive use of commissioners in so many important districts strongly suggests that many fed-

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foundation for the establishment of the right of reference as the rule, not the exception." In *United States* v. *Waymire*, 202 F. 2d 550 (C.A. 10), Judge Huxman stated (p. 555): "Unless we take care, trial by jury will become the exception and trial by commission the rule in condemnation proceedings, contrary to the spirit and intent of the rule."

[6] The data showing the number of references in federal condemnation cases are derived from the records of the Department of Justice.

eral judges are now referring all, or most, federal condemnation cases that come before them as a routine matter.[7] It is hard to believe that such a high percentage of cases in so many districts—100% in five districts, 95% in one, 90% in three, 80% in one, and 75% in eleven—all present such extraordinary circumstances as to justify overruling the parties' demands for jury trial.[8] If the instant decision, which probably represents the largest number of cases referred as a single group, remains unreviewed, it threatens further to increase this tendency toward routine referrals. It is therefore particularly important to the future development of the law in this important area that this Court enunciate the principles governing the use of commissions in federal condemnation proceedings.

2. The courts of appeals repeatedly have recognized that, when a jury trial is demanded in a federal condemnation case, Rule 71A(h) requires that it will

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[7] See, for example, the following colloquy in the District Court for the Southern District of Georgia on June 12, 1958, during an argument on a motion to confirm a commissioners' report (*United States* v. *28.67 Acres of Land*, Civil Action No. 735, Tract D-414-E, Transcript, Vol. IV, p. 13):

"Mr. Lewis [Assistant United States Attorney]: I would like to point out this, sir, that the last case heard by a jury in this District was the Gibson case in January, 1954.

"The Court: Well, that is going to be the last one, too, as far as I am concerned."

[8] Under Rule 71A(h), the trial of the issue of just compensation "shall * * * be by the court" unless "any party" files a timely demand for jury trial, in which case he "may have a trial by jury of the issue of just compensation * * * unless the court * * * orders that * * * the issue of compensation shall be determined by a commission * * *."

ordinarily be granted, except where there are extraordinary and unusual circumstances in the particular case that make it appropriate "in the interest of justice" that the issue of just compensation be determined by a commission. Thus, in *United States* v. *Theimer*, 199 F. 2d 501, 503 (C.A. 10), the court, in reversing an order of reference, pointed out that "[t]hroughout all" the lengthy studies that had been made over the years by various groups of the proper procedures for federal condemnation cases (which studies resulted in Rule 71A(h)), there "runs the thought that litigants should have the right of trial by jury of the issue of value except only in extraordinary and exceptional cases and that the commissioner provision of the Rule should be employed only in exceptional cases where because of peculiar circumstances trial by jury was inadvisable." On the basis of this history, the court ruled (pp. 503–504) that "the parties to a condemnation proceeding are ordinarily entitled to a jury under Rule 71A(h) as a matter of right and that where demand is made for the same the judge must grant a jury trial, unless under the facts as they appear in the case * * * the interest of justice warrants the submission of question of value and compensation to a commission." The court held (p. 504) that the ground upon which the reference was made—the wish "to remove all obstacles that cause delay and bring this action to a conclusion"—did not "constitute such extraordinary circumstances as to warrant the trial court in invoking the extraordinary provisions of the Rule." See, also, the subsequent decisions of that

court in *United States* v. *Wallace*, 201 F. 2d 65, and *United States* v. *Waymire*, 202 F. 2d 550.

Similarly, in *United States* v. *Buhler*, 254 F. 2d 876, 880 (C.A. 5), the court stated that "[t]o justify denial of a timely demand for jury trial, it is essential that the exercise of the court's discretion be based upon some exceptional reasons in the interest of justice * * *." See, also, *United States* v. *Bobinski*, 244 F. 2d 299, 301 (C.A. 2), where Chief Judge Clark pointed out that "Both the language and the history of F.R. 71A(h) amply demonstrate that trial to the court is to be the usual method of settling values in Government condemnation, subject to a right in either party to make timely claim for a jury, and that *reference to commissioners is to be an exception for special situations*" (emphasis added). Thus, the "other reasons in the interest of justice," which Rule 71A(h) authorizes as a basis for a reference, must, like the preceding grounds of "character, location, or quantity of the property to be condemned," relate to the exceptional circumstances involving the particular "property to be condemned."

This settled view of the courts of appeals that Rule 71A(h) permits the district court to reject a demand for jury trial only in exceptional circumstances is supported by a report of the Judicial Conference of the United States made shortly after Rule 71A was promulgated on April 30, 1951 (341 U.S. 962). In recommending against enactment of a proposed bill (S. 1958, 82d Cong.) that would have guaranteed any party to a federal district court condemnation action

the right to trial by jury "except where a tribunal has been specially constituted by an Act of Congress governing the case for the determination of that issue," the Judicial Conference stated that it construed Rule 71A(h) "as prescribing trial by jury as the usual and customary procedure to be followed, if demanded, in fixing the value of property taken in condemnation proceedings, and as authorizing reference to commissioners only in cases wherein the judge, in the exercise of a sound discretion based upon reasons appearing in the case, finds that the interests of justice so require." H. Doc. No. 490, 82d Cong., 2d Sess., pp. 5–6.

3. We submit that the grounds upon which the district court here based its blanket reference of 21 pending cases, involving 300 parcels, fall far short of the kind of "extraordinary circumstances" that, under the Rule, justify the denial of a demand for jury trial.

a. In upholding the references, the court of appeals correctly held (App., *infra*, p. 27) that "[a] condition of calendar congestion standing alone is not justification for a reference to commissioners under the Rule." See *infra*, pp. 19–23. The court stated, however, that the district court (App., *infra*, p. 28) "gave consideration" to the following additional factors which, it held, sanctioned the references:

> * * * (1) the nature of the property, its varied terrain and uses; (2) the kind or type and nature of the rights or interests in the property for which just compensation was claimed; (3) the complexity of the issues involved; (4) the

improbability, if not impossibility, of trying the issue of just compensation of the various properties before one jury; and (5) the probability that the appointment of commissioners would result in more uniformity of awards for like property than could be expected if each case were tried by a jury.

In none of the cases, however, was the reference based on "the facts as they appear in the [particular] case" (*United States* v. *Theimer, supra*). The same findings were made in the 21 cases, involving land in four different and widely separated federal projects. The lack of any proper exercise of judicial discretion in making these blanket references is further shown by the fact that, after the first group of cases had been referred in May, the court automatically referred cases subsequently filed in the same projects, without making any independent findings or analysis, but solely on the basis of, and incorporating by reference, the findings previously made.

Moreover, the five reasons given by the court of appeals do not justify the references. The invalidity of the third reason—the alleged complexity of the issues—is fully discussed in our *Cunningham* petition (pp. 11–14), and we shall not repeat that discussion here. Both the first and fifth reasons—the nature of the property and the probability that use of commissions instead of juries would result in more uniformity of awards—would justify blanket references for virtually every non-urban federal project of substantial size. As the district court's findings show, there is nothing particularly unusual about the "na-

ture" or the "terrain and uses" of the property condemned. The description of the land in the Lemoore cases—which is similar to the land in the other projects (P. 8, 17, 27)—is as follows (P. 1): "It is in an area largely devoted to agricultural uses and purposes and related activities, and land devoted to similar uses is generally similar in character in that area."

The second and fourth reasons (and, to some extent, the third) do not relate to the determination of just compensation for the "value of the property as a whole" (*Silberman* v. *United States*, 131 F. 2d 715, 717 (C.A. 1), but to the problems of apportioning the award among the various interests in the property. Thus, the district court stated (P. 2, emphasis added) that "[i]t is impractical, if not impossible, to try all of the remaining parcels in said cases and *various interests and estates taken*, before one jury," and it referred to the "divergent nature of estates claimed or taken, or of divergent ownerships." Rule 71 A(h), however, permits the court to refer to commissioners only the "issue of [just] compensation"; trial of all other issues shall "be by the court." The apportionment of an award among various claimants is not part of the issue of just compensation, and the district court therefore erred in referring the apportionment issue to commissioners.* See *United States*

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*That the court did refer the apportionment issue to the commissioners is clearly shown by its amended order of reference (P. 140), which directs them to make a "separate award of just compensation and valuation * * * with respect to each separate parcel, *interest, ownership*, or *claim* involved, and the

v. *70.39 Acres of Land*, 164 F. Supp. 451, 483 (S.D. Cal.), affirmed *sub nom. Carlstrom* v. *United States*, C.A. 9, Feb. 15, 1960; *United States* v. *111,000 Acres of Land, Etc.*, 155 F. 2d 683, 685 (C.A. 5); *United States* v. *53¼ Acres of Land, Etc.*, 176 F. 2d 255, 258 (C.A. 2); cf. *United States* v. *Dunnington*, 146 U.S. 338, 353.

b. As the court of appeals recognized (App., *infra*, pp. 27–28), the district court's reference "orders did * * * deal extensively with the problems of congestion facing the court." The district court, after referring to the number of condemnation cases pending in the District and the estimated time required if all of them were tried before juries, concluded that it "would be a denial of justice to compel those whose properties are taken in the within condemnation proceedings to await trial by jury of each tract or parcel involved in these cases" (R. 2–3).

But calendar congestion, and the hope that pending cases will be disposed of more quickly if jury trials are bypassed, are not valid grounds for a reference. *La Buy* v. *Howes Leather Co.*, 352 U.S. 249; *McCullough* v. *Cosgrove*, 309 U.S. 634; *United States* v. *Kirkpatrick*, 186 F. 2d 393 (C.A. 3). As this Court stated in *La Buy* (p. 259), "congestion in itself is not such an exceptional circumstance as to warrant a reference to a master. If such were the test, present congestion would make references the rule rather than the exception." Similarly, in *Kirkpatrick* the Third

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person, or persons, or entity claiming to be entitled to receive such award or *such portions thereof as each may claim to be entitled to receive*" (emphasis added).

Circuit, sitting *in banc*, held (p. 397) that "the district court is not empowered to make a general compulsory reference of all the issues in a group of admiralty cases, as the court is doing here, merely to relieve a congested docket and not because the cases themselves present exceptional circumstances which make reference of them necessary for the purposes of justice."

Moreover, the notion that reference to commissioners expedites litigation is, we believe, unfounded. "It is a matter of common knowledge that references greatly increase the cost of litigation and delay and postpone the end of litigation. References are expensive and time-consuming. The delay in some instances is unbelievably long" (*Adventures in Good Eating* v. *Best Places to Eat*, 131 F. 2d 809, 815 (C.A. 7)).

The government's experience with the use of commissioners in condemnation proceedings indicates that they delay rather than expedite the final disposition of such cases. The *Cunningham* case, which is still not completed more than seven years after the complaint was filed, is a good illustration of this unfortunate characteristic of references (see our *Cunningham* petition, pp. 13–14).[10] Indeed, this fact has been recog-

[10] Another example is *United States* v. *1,000 Acres of Land* (Civil 698, E.D. La.), in which commissioners were appointed on October 11, 1954, the hearings before them ended on April 28, 1955, and their report was not filed until October 28, 1958, 3½ years later. The matter is still pending before the district court on the government's objections to the commissioners' report.

nized even where the court upheld the reference. In *United States* v. *Delaware, L. & W. R. Co.*, 264 F. 2d 112, 115 (C.A. 3), certiorari denied, 361 U.S. 819, the court stated: "[W]e do not lose sight of the fact that among other things a reference to a commission tends unduly to prolong the proceedings, thereby causing vexation to all concerned and additional expenses * * *." See, also, *United States* v. *Bobinski*, 244 F. 2d 299, 301 (C.A. 2).

There are numerous factors which combine to cause delay when condemnation cases are referred to commissioners. The hearings generally take longer, both because of the lack of judicial experience of the presiding commissioner in expediting the proceedings, and the inevitable tendency of laymen to permit the introduction of irrelevant and cumulative evidence. Moreover, the commissioners may be required to postpone hearings and other work on the cases because of the demands of their primary occupations. The commission is required to file a detailed report fully explaining the basis for the award; its preparation is often a time-consuming and difficult task. Thus, although a jury verdict promptly follows the presentation of evidence, in cases referred to commissioners many months often elapse between the closing of the hearing and the filing of the report.[11] There then

[11] In the *Cunningham* case, the hearings before the commission were completed in June, 1955; its first report (of two pages) was filed seven months later, in January, 1956. Following the reversal by the court of appeals, the case was remanded to the commission on September 5, 1957, to prepare a supplemental report "with reasonable promptness." The supplemental report was filed five months later, on Febru-

ensue district court proceedings on the confirmation of the report and appellate review which, as *Cunningham* shows, may result in vacation of the award because of the report's inadequacy. The result is further delay engendered by the preparation of a new report and another round of judicial proceedings.

It has also been the experience of the Department of Justice that more settlements result in cases scheduled for jury trial than among those referred to commissioners. When several tracts in the same or similar areas are referred to commissioners (as in the instant case), the defendants tend to await the first decision before discussing settlement, in order to ascertain the level at which the commissioners will make their awards. As we have indicated, that determination may take a considerable period, during which the commissioners may be hearing other cases. Settlements rarely occur, however, once the evidence has been presented. On the other hand, when the case is scheduled for jury trial, the judge frequently is able to effect a settlement between parties who are

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ary 3, 1958. See the joint appendix in the court of appeals in case No. 7402, pp. 25, 694; joint appendix in case No. 7817, pp. 21, 24, 29–44. Both joint appendices have been filed as part of the certified record in the *Cunningham* case.

In *United States* v. *Buhler*, 254 F. 2d 876 (C.A. 5), the Court of Appeals, on April 29, 1958, held that a report of a commission appointed in September 1955 was inadequate. The district court remanded the case to the commission in October 1958, and it was not until April 5, 1960, that it supplemented its original report to show in detail how it reached its total award of $1,268,850. No new evidence was taken nor was the total award changed by the supplemental report.

not too far apart. Thus, if the district court had granted the government's demand for jury trials in these cases, our experience indicates that a substantial number of these parcels probably would have been settled before trial.[12]

4. Since we believe that the right of the United States to a jury trial of the issue of just compensation "has been improperly denied" in this case, mandamus clearly was an appropriate remedy to vindicate that right. *Beacon Theatres* v. *Westover*, 359 U.S. 500, 511; *La Buy* v. *Howes Leather Co.*, 352 U.S. 249. The court of appeals recognized (App., *infra*, p. 27) that the claim of the United States that the references improperly deprived it of its right to trial by jury, "would [if established] justify issuance of the writ." Indeed, an extraordinary writ may be the only way in which the United States can obtain effective appellate review of this important issue. For once the commissioners have made their award and it has been confirmed by the district court, a court of appeals has a natural "reluctance to cause further delay and expense and to set at naught the * * * years of work devoted by the district court and the commission to [the] case" (*United States* v. *Buhler*, 254 F. 2d 876, 878 (C.A. 5)).

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[12] A government affidavit showed that only 91 of the 725 parcels disposed of in the Northern Division of the District during the period from July 1, 1955 to December 31, 1958, or less than 13%, "required jury trials" (P. 36).

CONCLUSION

This case presents important questions of judicial administration relating to the use of commissioners in federal condemnation proceedings, which should be settled by this Court. The petition for a writ of certiorari should therefore be granted.

Respectfully submitted.

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APRIL 1960.

APPENDIX

United States Court of Appeals for the Ninth Circuit

No. 16,707, Jan. 9, 1960

UNITED STATES OF AMERICA, PETITIONER

v.

HONORABLE PEIRSON M. HALL, CHIEF JUDGE, UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, RESPONDENT

Upon Petition for Writ of Mandamus or Other Extraordinary Relief

Before: HAMLEY, MERRILL and KOELSCH, Circuit Judges.

Per Curiam: The United States seeks a writ of mandamus requiring respondent, as Judge of the United States District Court for the Southern District of California, to vacate certain orders entered by him.

The orders were entered in 21 actions brought by the United States for the condemnation of lands required in 4 federal projects.[1] By these orders the

[1](a) Lemoore Naval Air Station, condemnation of 30,490.34 acres, 4 cases involving 159 parcels and 1,475 owners; (b) Success Dam and Reservoir, condemnation of 3,754.64 acres, 3 cases involving 47 parcels, with many sub-parcels, and 330 owners; (c) Terminus Dam and Reservoir, condemnation of 2,920.93

determination of the issue of just compensation in all 21 cases was referred to commissioners under Rule 71A(h), Federal Rules of Civil Procedure.[2] A motion of the United States to vacate this order was denied by respondent after hearing, and the present proceeding was then instituted.

The United States contends that the orders of reference demonstrate that these are not proper cases for reference to commissioners under the Rule and that the considerations which prompted the action of respondent judge are not proper considerations under the Rule; that, under these circumstances, respondent judge was without discretionary authority to refer

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acres, 5 cases involving 33 parcels, with many sub-parcels, and 185 owners: (d) Casitas Dam and Reservoir, condemnation of 6,964.41 acres, 9 cases involving 39 parcels and 135 or more owners.

[2] "Trial. If the action involves the exercise of the power of eminent domain under the law of the United States, any tribunal specially constituted by an Act of Congress governing the case for the trial of the issue of just compensation shall be the tribunal for the determination of that issue; but if there is no such specially constituted tribunal any party may have a trial by jury of the issue of just compensation by filing a demand therefor within the time allowed for answer or within such further time as the court may fix, unless the court in its discretion orders that, because of the character, location, or quantity of the property to be condemned, or for other reasons in the interest of justice, the issue of compensation shall be determined by a commission of three persons appointed by it. If a commission is appointed it shall have the powers of a master provided in subdivision (c) of Rule 53 and proceedings before it shall be governed by the provisions of paragraphs (1) and (2) of subdivision (d) of Rule 53. Its action and report shall be determined by a majority and its findings and report shall have the effect, and be dealt with by the court in accordance with the practice, prescribed in paragraph (2) of subdivision (e) of Rule 53. Trial of all issues shall otherwise be by the court."

the matters; that by his actions the United States wrongfully has been deprived of jury trials upon the issue of just compensation. In our view, such contentions if established, would justify issuance of the writ under *LaBuy* vs. *Howes Leather Co.*, 352 U.S. 249 (1957), and *Beacon Theatres, Inc.* vs. *Westover*, 359 U.S. 500 (1959). In seeking a review of an interlocutory order of the District Court by this extraordinary remedy, however, the burden upon the United States is a heavy one. There must be a showing of "clear abuse of discretion or 'usurpation of judicial power.'" *LaBuy* vs. *Howes Leather Co.*, supra, at 257; *Bankers Life & Casualty Co.* vs. *Holland*, 346 U.S. 379, 383 (1953). It must appear that "its right to issuance of the writ is 'clear and indisputable.'" *Bankers Life & Casualty Co.* vs. *Holland*, supra, at 384.

The position of the United States is that the purpose of the respondent judge was to relieve the calendar congestion facing the District Court. The United States asserts that by these orders respondent judge has referred all condemnation cases pending before him. It refers to the action of respondent judge as a "blanket order" and contends that, if such procedural practice is permitted, jury trial may well be lost to all litigants upon the issue of value in condemnation cases.

A condition of calendar congestion standing alone is not justification for a reference to commissioners under the Rule. Cf. LaBuy vs. Howes Leather Co., supra; United States vs. Kirkpatrick, 186 F. 2d 393 (3 Cir., 1951).

In these cases, however, the orders clearly demonstrate that the court had other considerations in mind. Compare United States vs. Theimer, 199 F. 2d 501 (10 Cir., 1952). The orders did, it is true, deal exten-

sively with the problems of congestion facing the court. This is perhaps understandable since respondent is the Chief Judge of the District and such problems are peculiarly his concern. In addition to calendar congestion, however, the orders gave consideration to (1) the nature of the property, its varied terrain and uses; (2) the kind or type and nature of the rights or interests in the property for which just compensation was claimed; (3) the complexity of the issues involved; (4) the improbability, if not impossibility, of trying the issue of just compensation of the various properties before one jury; and (5) the probability that the appointment of commissioners would result in more uniformity of awards for like property than could be expected if each case were tried by a jury.[3]

The United States asserts that, while mention is made of these considerations, they are not shown to apply to any specific parcel or ownership, but are mentioned generally as applying to all lands included within each order. Further, it asserts that the orders wholly failed to show wherein the circumstances as to any of the considerations mentioned are extraordinary or unusual. The United States contends in this regard that a burden is upon the judge in each order of reference to show facts justifying his exercise of discretion under the Rule; that the orders are therefore insufficient to support an exercise of discretion.

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[3] Complexity has been recognized to be a valid consideration under the Rule: *United States vs. Buhler*, 254 F. 2d 876, 880 (5 Cir., 1958); *United States* vs. *Cunningham*, 246 F. 2d 330, 333 (4 Cir., 1957); *United States* vs. *Waymire*, 202 F. 2d 550 (10 Cir., 1953) (Semble). The same is true as to the consideration of quantity and uniformity: Note of Advisory Committee on Rules, Supplementary Report, 28 U.S.C.A., Rule 71A (1958 Supp.); *United States* vs. *Robinski*, 244 F. 2d 299, 300 (2 Cir., 1957) (dictum).

This contention we reject. The United States concedes that as to each project various parcels taken are similar in character and use. In cases such as these, involving multiple takings for large governmental projects, it is our understanding that the Rule allows as proper a grouping of similar parcels for consideration, to the end that discrimination be avoided and uniformity in compensation be had. See authorities cited in footnote 3. The very use of the word "quantity" in the Rule lends support to such construction.

Each order shows upon its face that all the listed considerations were in the mind of the judge as to the lands taken for each project and were felt by him to warrant an exercise of his discretionary authority. We shall not, for lack of specification or detail, presume to the contrary. The burden instead is upon the United States to make a clear showing to this Court that such factors were not involved in these cases. This burden the United States has failed to meet.

Writ denied.

(Endorsed:) Per Curiam Opinion. Filed January 9, 1960.

FRANK H. SCHMID, *Clerk.*

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